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FILED
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

No. 683

IN THE MATTER
OF
REGINALD LUSH,
Appellant,
vs.
THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,
Respondent,

BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF MANCHESTER, FARMINGTON, HOPEWELL, ONTARIO COUNTY, STATE OF NEW YORK,
Intervenor-Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

NOTICE TO DISMISS APPEAL.

MAX G. MORRIS,
Attorney for Intervenor-Respondent,
South Main Street,
Manchester, N. Y.

THE REPORTER COMPANY, INC., Walton, N. Y.—1961

Index.

	Page
Preliminary Statement	1
Statement of Facts	1
Argument	
POINT I. The Supreme Court lacks jurisdiction to entertain this appeal	4
POINT II. The appeal herein does not present a substantial federal question	9
Rebuttal	13
Conclusion	13
Appendix "A"	15

CITATIONS

CASES:

Arcuri, Matter of v. Macduff, 286 App. Div. 17 (3d Dept. 1955)	12
Badman, Matter of v. Falk, 4 A. D. 2d 149 (3d Dept. 1957)	11
Board of Educ. of the City of New York, Matter of v. Allen, 6 N. Y. 2d 127 (1959)	9
Department of Banking v. Pink, 317 U. S. 264 (1942)	7
Federal Trade Comm'n v. Minneapolis-Honeywell Co., 344 U. S. 206 (1952)	7, 8
Levitch, Matter of v. Board of Educ., 243 N. Y. 373 (1926)	10
Market St. Ry. v. Railroad Comm'n, 342 U. S. 548 (1945)	8
Murphy v. Commissioner of Educ., 361 U. S. 117 (1959)	9, 13, 14

Page

O'Brien, Matter of v. Commissioner of Educ., 4 N. Y. 2d 140 (1958) 9

Ross, Matter of v. Wilson, 308 N. Y. 605 (1955) 10

Zucht v. King, 260 U. S. 174 (1922) 4

STATUTES:

U. S. Const., amend. XIV 5, 9

28 U. S. C. §1257 ..... 3, 4, 8

28 U. S. C. §2101(c) 6

N. Y. Civ. Pract. Act §588(4) 5

N. Y. Civ. Pract. Act §589 6

N. Y. Civ. Pract. Act §1295 12

N. Y. Educ. Law §2215 (12) 11

MISCELLANEOUS:

Bunn, Jurisdiction and Practice of the Courts of the United States (5th ed. 1949) 4

NOTICE TO DISMISS APPEAL.

Preliminary Statement.

The intervenor-respondent, the Board of Education of Central School District No. 1 of the Towns of Manchester, Farmington, Hopewell, Ontario County, New York, does hereby move to dismiss the appeal herein.

The grounds for the motion to dismiss the appeal are as follows:

1. The Supreme Court lacks jurisdiction to entertain this appeal.

2. The appeal does not present a substantial Federal question.

Statement of Facts.

This litigation follows a Special Meeting of the voters of Central School District No. 1 of the Towns of Manchester, Farmington, Hopewell, Ontario County, New York, held November 17, 1956, at which a vote was taken on a proposition to build a junior-senior high school at an estimated cost of $1,350,000.

Prior to the meeting, the Board of Education had adopted personal registration as a prerequisite for voting at School District meetings.

After the voting, the chairman of the meeting declared the proposition adopted.

Appellant, Reginald Lush, appealed to respondent, Commissioner of Education, to set aside the declared result of the vote and declare the proposition lost on the grounds stated in his petition, the principal grounds being that forty-eight persons were not permitted to vote because they had not registered, and that eleven persons who had not registered were permitted to vote. The

result of the voting was "Yes," 597; "No," 550; blank, 45; void, one.

The Board of Education appeared and filed its answer by its attorney.

The Commissioner of Education, respondent herein, considered the voluminous record made up of material, affidavits, and exhibits submitted both by appellant and the Board of Education. The Commissioner of Education heard oral arguments from the attorneys representing the parties on January 30, 1957, and rendered a written determination dismissing the appeal on March 27, 1957 (appellant's jurisdictional statement, appendix "B").

Appellant then instituted a special proceeding in the New York Supreme Court, Albany County, by a petition to review the determination of the Commissioner of Education pursuant to Article 78 New York Civil Practice Act. Justice Herbert D. Hamm at a special term of the New York Supreme Court, Albany County, reviewed the proceedings and rendered a decision on October 8, 1957, dismissing the petition (appellant's jurisdictional statement, appendix "C").

Appellant next appealed to the Appellate Division of the New York Supreme Court, Third Judicial Department, from Justice Hamm's order dismissing the petition. The Appellate Division in a decision dated April 23, 1959, unanimously affirmed Judge Hamm's order (appellant's jurisdictional statement, appendix "D").

Appellant next appealed to the New York Court of Appeals from the unanimous affirmance of the Appellate Division, relying solely on alleged questions of constitutionality (see appellant's notice of appeal annexed hereto as appendix "A"). The appeal on this limited ground was taken as a matter of right.

The Court of Appeals on October 22, 1959, dismissed the appeal "upon the ground that no substantial constitutional question is directly involved" (see appellant's jurisdictional statement, appendix "E" at 44). After entry of this order of the Court of Appeals in Albany County Clerk's office on November 5, 1959, appellant moved in the Appellate Division, Third Department, for a re-argument of the appeal or in the alternative for leave to appeal to the Court of Appeals. This motion was unanimously denied January 4, 1960, and an order to this effect was entered February 3, 1960, in Albany County Clerk's office (appellant's jurisdictional statement, appendix "F").

Appellant then made a motion in the New York Court of Appeals for leave to appeal to that court, which was denied April 1, 1960, and entered in Albany County Clerk's office on April 21, 1960.

On June 27, 1960, appellant filed a petition for appeal to the Supreme Court of the United States from the first order of the New York Court of Appeals entered November 5, 1959 (in which the Court held that no substantial constitutional question was directly involved), as well as from the second order of the New York Court of Appeals entered April 21, 1960 (denying leave to appeal). The appeal is taken to this court pursuant to the provisions of title 28 U. S. C., section 1257(2) (1952).

It would appear from appellant's jurisdictional statement (pp. 2 and 3) that he is now limiting his appeal to the first order of the New York Court of Appeals (of November 5, 1959), and is abandoning his appeal from the second order (of April 21, 1960).

POINT I.

The Supreme Court lacks jurisdiction to entertain this appeal.

A. The Supreme Court may review only those final decisions of state courts which contain a substantial federal question.

Congress has, within constitutional limitations, provided Supreme Court review of final state court decisions in limited cases directly involving what are customarily called "federal questions." 28 U. S. C. §1257 (1952); see *Bunn, Jurisdiction and Practice of the Courts of the United States*, 241 (5th ed. 1949). Review will not be had, however, unless the federal question is substantial in character. *Zucht v. King*, 260 U. S. 174, 176 (1922) (dictum).

Appellant petitions for appeal here, under 28 U. S. C. §1257(2) (1952), on the ground that the New York Court of Appeals sustained the validity of various sections of the New York Education Law over appellant's contention that the operation and effect of the law were repugnant to the fourteenth amendment of the United States Constitution. There are two separate orders of the Court of Appeals involved here. One was filed on November 5, 1959 (see appellant's jurisdictional statement, appendix "E"), and the second was filed on April 21, 1960 (see appellant's jurisdictional statement, appendix "G").

B. All of the federal questions for which appellant seeks review were finally determined by the New York Court of Appeals order of November 5, 1959.

From the adverse decision of the trial court (see appellant's jurisdictional statement, appendix "C") and the

unanimous affirmance of the Appellate Division, Third Department (see appellant's jurisdictional statement, appendix "D"), appellant took his appeal as of right to the New York State Court of Appeals under §588(4) of the New York Civil Practice Act. This section permits appeals as of right from an order of a court of record of original jurisdiction

> which finally determines a special proceeding, where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

This section concludes:

> and on any such appeal, only the constitutional question shall be considered and determined by the court.

Following the requirements of this section, appellant states in his notice of appeal to the Court of Appeals that he was

> relying *solely* upon the question directly involving the construction of the following provisions of the Constitution of the State of New York * * * and the U. S. Constitution, Amendment 14, Section 1 * * * (appendix "A" hereto). (Italics added.)

Upon motion of the counsel for the Commissioner of Education, respondent here, the Court of Appeals, in its order entered November 5, 1959, dismissed the appeal "upon the ground that no substantial constitutional question is directly involved" (see appellant's jurisdictional statement, appendix "E" at 44). This order finally determined each and every constitutional, or "federal," question which appellant could have raised, and, in fact, did raise. Appellant is now attempting to appeal to this Court the constitutional questions determined adversely by the order of the Court of Appeals of November 5, 1959.

C. As the petition to appeal to this Court was not filed until June 27, 1960, this appeal from the order of the New York Court of Appeals of November 5, 1959 has not been timely filed.

Appellant had a period of ninety days in which to take his appeal to this Court. 28 U. S. C. §2101(c) (1952). Appellant took almost eight months to take its appeal from November 5, 1959, to June 27, 1960. No application to a Justice of the Supreme Court for an extension of time to appeal was made. Appellant is, therefore, barred from appealing to this Court from the order of the New York State Court of Appeals of November 5, 1959.

Appellant attempts, somewhat elliptically, to excuse his delay by explaining that events subsequent to the final order of November 5, 1959, tolled the ninety-day period (appellant's jurisdictional statement at 3). This contention is incorrect, because the subsequent events bear no relationship to the constitutional questions sought to be reviewed in this Court.

After the order of November 5, 1959, in which the Court of Appeals found no substantial constitutional question, appellant returned to the Appellate Division, Third Department, and pursued a different avenue of appeal on different grounds. Using the procedure of §589 of the New York Civil Practice Act, appellant moved in the Third Department for leave to appeal to the Court of Appeals. Leave was sought on questions of law other than the constitutional questions, which appellant did not and could not resurrect. After the Third Department denied appellant's leave (see appellant's jurisdictional statement, appendix "F"), he moved for leave directly in the Court of Appeals. This motion was denied by the second Court of Appeals order, entered April 21, 1960 (see appellant's jurisdictional statement, appendix "G").

The question is: did this second order keep alive the constitutional questions resolved by the first order? The answer found in *Department of Banking v. Pink*, 317 U. S. 264 (1942), and in *Federal Trade Comm'n v. Minneapolis-Honeywell Co.*, 344 U. S. 206 (1952), is that it did not.

In the *Pink* case the Court held that an amendment to a final order of the New York Court of Appeals, which noted that a federal question was presented in the final order, did not extend the ninety-day period within which to apply for certiorari. The Court looked to see

> whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court.

Department of Banking v. Pink, 317 U. S. 264, 268 (1942). The Court found that the rights in the final order were fully and finally adjudicated and declined jurisdiction. Here the November 5, 1959 order of the Court of Appeals has also fully and finally adjudicated the constitutional issues involved.

The Court noted in the *Pink* case, *id.* at 266, that a timely petition for rehearing to the Court of Appeals tolls the limitation period because it operates to suspend the finality of the Court's judgment. There, as here, however, there was no such petition made to the Court of Appeals.

A plainer test than that in the *Pink* case is found in *Federal Trade Comm'n v. Minneapolis-Honeywell Co.*, 344 U. S. 206, 212 (1952).

> The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

In its order of April 21, 1960, the Court of Appeals was neither asked nor empowered to disturb or revise the constitutional questions decided by its order of November 5,

1959. Except in result, the orders were entirely different.

The order of November 5, 1959, was the final order of the final New York State Court on constitutional issues, see *Market St. Ry. v. Railroad Comm'n*, 324 U. S. 548, 551 (1945), although the case itself continued on other matters. Statutes of limitation

> are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review.

Federal Trade Comm'n v. Minneapolis-Honeywell Co., 344 U. S. 206, 213 (1952). Appellant's time to appeal to this Court on federal questions began on November 5, 1959, and ended long before the petition for appeal was made. This Court, therefore, lacks jurisdiction to review the Court of Appeals order of November 5, 1959.

D. No appeal to this Court may be taken from the New York Court of Appeals order, dated April 21, 1960.

Although the appellant's petition for appeal was filed within ninety days of the second order of the New York State Court of Appeals—from April 21, 1960 to June 27, 1960—this Court has no jurisdiction to entertain the questions raised by the second order. Since all federal questions were decided by the Court of Appeals order of November 5, 1959, none were or could be raised in the order of April 21, 1960. Therefore, this Court is without jurisdiction to review the questions presented by the second order. See 28 U. S. C. §1257 (1952).

POINT II.

The appeal herein does not present a substantial federal question.

The only federal or constitutional question which appellant seeks to present relates to the "due process clause," section I of the fourteenth amendment to the Constitution of the United States.

Appellant relies on two aspects of the proceedings, claiming that one or both have been a denial of due process: A. The proceedings before the Commissioner of Education; B. The proceedings before New York Supreme Court at special term, Albany County.

A. The proceedings before the Commissioner of Education were conducted in accordance with the rules established by the Commissioner. Appellant accepted and complied with these rules. He submitted affidavits and other documentary and written proof in support of his position. He called upon the Board of Education to submit documents and records for consideration by the Commissioner of Education. The appellant was afforded an oral argument. He accepted all the benefits afforded him by the Commissioner's rules. The Commissioner of Education's resolution of a dispute, even on conflicting affidavits, does not involve a constitutional question of any kind. *Matter of O'Brien v. Commissioner of Educ.*, 4 N. Y. 2d 140 (1958), *cert. denied, sub nom. Murphy v. Commissioner of Educ.*, 361 U. S. 117 (1959).

In the *Matter of Board of Educ. of the City of New York v. Allen*, 6 N. Y. 2d 127 (1959), the New York Court of Appeals has interpreted that part of section 310 of the Education Law, which reads as follows:

> Any person conceiving himself aggrieved may appeal or petition to the commissioner of education

> who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be *final and conclusive, and not subject to question or review in any place or court whatever.* (Italics added.)

Chief Judge Conway in this case, writing for a majority of the court, states:

> If the words of section 310 were to be read literally there could be no court review whatever of the Commissioner's decisions on appeal, for the statute states that his decision "shall be final and conclusive, and not subject to question or review in any place or court whatever." However, our court has determined that the Legislature did not intend that the words are to be so read. Thus, we have said that "decisions by the Commissioner of Education are final *unless purely arbitrary.*" (*Matter of Ross v. Wilson*, 308 N. Y. 605, 608, italics supplied; *Matter of Levitch v. Board of Educ.*, 243 N. Y. 373, 375.) The term "arbitrary," standing by itself, would be quite sufficient to make it plain that only a narrow review of the Commissioner's decisions is available in the courts. In the above-cited cases we undertook to emphasize the point by employing the phrase "purely arbitrary."

The interpretation of this statute does not involve a constitutional question of any kind and is therefore binding upon the appellant here. The interpretation placed upon a state statute by the highest court of that state establishes the legislative intent and in the absence of a constitutional question finally determines the law of that state.

The record of the proceedings before the Commissioner is barren of any refusal of the appellant to abide by the rule. The record does not indicate that appellant re-

quested that the proceedings be referred by the Commissioner to the District Superintendent of Schools to conduct a hearing and to report the evidence taken at the hearing to the Commissioner as might have been done under subdivision 12 of section 2215 of the Education Law of the State of New York. The record does not show that appellant asked or demanded the right to call and examine witnesses. It does not indicate any request or demand that appellant be afforded the opportunity to cross examine any adverse witnesses. The record does not show any protest by the appellant to the method the examiner used to get at the facts. Under such circumstances and in the state of this record it has recently been stated (Van Voorhis, J., in *Matter of O'Brien, supra*), that appellant has waived any right he might have had to raise the constitutional question of due process even if one existed.

B. The proceedings before the New York Supreme Court at Special Term, Albany County (Hamm, J.), afforded appellant another opportunity for "due process." He presented his proof and called upon the Board of Education and the Commissioner of Education to present facts, records, and evidence upon which appellant relies. The Court at Special Term had the authority at that stage of the proceeding to take testimony, conduct a hearing and grant the parties the right to cross examination of witnesses. The appellant requested that this be done. The Court at Special Term concluded, after full consideration of the matter, that there was no question of fact involved. The final portion of Justice Hamm's opinion dismissing the petition reads as follows:

> The petition contains 121 allegations. There may be some with "fringe issues of fact" involved (Cf. *Matter of Badman v. Falk*, 4 A. D. 2d 149, 153), but none of them is such that its resolution in the petitioner's favor would leave no rational basis for

> the Commissioner's decision. And as to all of the issues sought to be raised by the petitioner, Mr. Justice Halpern's statement is apposite (*Matter of O'Brien v. Commissioner of Education*, 3 A. D. 2d 321, *supra*, 325): "* * * In an appropriate case in a proceeding in the nature of mandamus, the Court may direct a hearing to be held (Civ. Prac. Act, Sec. 1295; *Matter of Acuri v. Macduff*, 286 App. Div. 17, and the cases there cited). However, in order to be entitled to a hearing the petitioner must demonstrate that there is a triable issue of fact, the resolution of which in his favor would leave no rational basis for the administrative decision. This the petitioners fail to do in this case." The petition is dismissed without costs. Submit order on three days notice.

The unanimous affirmance by the Appellate Division, Third Department, of the order of the Special Term, Albany County, evidenced a concurrence by that court that no question of fact was involved. Under such circumstances and findings there was no need to set the matter down for trial, and the refusal to afford a litigant a trial of questions of fact when no material question of fact exists, is not a denial of due process. Judges are required to determine on many occasions whether or not a question of fact exists. The granting of a motion for a nonsuit, the granting of a motion for a directed verdict, the granting of a motion for summary judgment, all require a determination by the presiding judge that no question of fact exists. There is then no need to send questions to a jury, and in case of summary judgment there is no need even to have a trial at all. Such action has never been held to be unconstitutional as a denial of due process or as depriving one of a constitutional right to a jury trial.

All the issues of law including the constitutional question sought to be raised have heretofore and recently been

considered by this Court in *Murphy v. Commissioner of Educ.*, 361 U. S. 117, decided November 23, 1959, adversely to the appellant's position.

Rebuttal.

Intervenor-respondent does not question the contention that the validity of a tax on appellant's property depends on compliance with due process, but the other points raised by appellant do not involve a federal or constitutional question and have been finally resolved by the litigation and decisions in the Courts of the State of New York. The appellant, for example, does not contend that *he* was deprived of his right to vote, so there can be no question here of denial of equal protection.

The Commissioner of Education rendered a written decision containing his determination of the facts, and this constituted sufficient findings of fact as required by the law of New York. There is no requirement in New York that findings of fact be numbered or tabulated or set forth in any particular way. In any event, no federal question is involved in the manner in which facts found are to be set forth.

CONCLUSION.

The appeal should be dismissed.

1. It was not taken in time.

2. Even if the appeal had been timely taken, it should be dismissed, for

a. the record shows appellant has had his day in court and the constitutional requirements of due process have been afforded him throughout;

b. the appellant has waived any right which he might have had to call witnesses and cross examine witnesses by his failure to demand such right before the Commissioner of Education.

3. All issues of constitutionality presented by the present record have heretofore been considered by this Court and decided adversely to the contentions of appellant in *Murphy v. Commissioner of Educ.*, 361 U. S. 117 (1959).

Respectfully submitted,

MAX G. MORRIS,
Attorney for Intervenor-Respondent,
Office and P. O. Address,
South Main Street,
Manchester, New York.

HENRY W. WILLIAMS, JR.,
and
NICHOLAS E. BROWN,
Of Counsel.

APPENDIX "A"

STATE OF NEW YORK, COURT OF APPEALS,

COUNTY OF ALBANY.

IN THE MATTER
of

The Appeal of REGINALD LUSH, under Article 78 of the Civil Practice Act, to review the decision and order of the COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, Respondent, holding valid a special election held by the Board of Education, Central School District No. 1, of the Towns of Manchester, Farmington, Hopewell, Ontario County, in the State of New York.

PLEASE TAKE NOTICE that the petitioner-appellant, Reginald Lush, relying solely upon the question directly involving the construction of the following provisions of the Constitution of the State of New York: Article 1, Section 1; Article 1, Section 6; Article 1, Section 11; Article 2, Section 5; Article 2, Section 6; Article 2, Section 7; and the U. S. Constitution, Amendment 14, Section 1; hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Third Department, entered in the Office of the Clerk of the County of Albany on May 5, 1959 upon the decision of the Appellate Division, Third Department, entered in the Office of the Clerk of that court on April 23, 1959; and thereafter amended by an amended decision entered in the Office of the said clerk of that court on April 29, 1959, which affirmed the decision and order of the Special Term of Albany County, entered in the Office of the Clerk of the County of Albany on the 7th day of November, 1957, which order dismissed on the merits a petition under Article 78 of the Civil Practice Act to review a

determination of the respondent, Commissioner of Education, holding valid a special election held by the Board of Education of Central School District No. 1 of the Towns of Manchester, Farmington and Hopewell, Ontario County; and that this appeal is from each and every part of said judgment and order as well as the whole thereof.

Dated: June 2, 1959.

Yours, etc.,

FRANCIS G. HESSNEY, Esq.,
Attorney for Petitioner-Appellant,
74 South Main Street,
Canandaigua, New York.

To:

Clerk,
County of Albany.

To:

Charles A. Brind, Jr., Esq.,
Attorney for Respondent,
State Education Building,
Albany, New York.

To:

Max G. Morris, Esq.,
Attorney for Intervener,
3 South Main Street,
Manchester, New York.

Affidavit of Service.

I, HENRY W. WILLIAMS, JR., an attorney of counsel to Max G. Morris, attorney of record of the intervenor-respondent herein, depose and say that on February , 1961, I served a copy of the foregoing notice of motion to dismiss appeal by depositing it in the United States mails with first-class postage prepaid to the following counsel of record:

Charles A. Brind, Jr., Esq., Attorney for the Commissioner of Education, Respondent, State Education Building, Albany, New York.

Francis G. Hessney, Esq., Attorney for Reginald Lush, Appellant, 74 South Main Street, Canandaigua, New York.

Subscribed and sworn to before me
at Rochester, New York,
this day of February, 1961.

KREAG DONOVAN,
Notary Public in the State of New York.
Monroe County, New York.

Commission expires March 30, 1962.